Filed 2/9/04 P. v. Warren CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN STEPHEN WARREN,

Defendant and Appellant.

F042263

(Super. Ct. No. CRP9607)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and Catherine Chatman, Deputy Attorneys General, for Plaintiff and Respondent.

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John Stephen Warren was committed for an additional two-year term as a sexually violent predator (SVP) pursuant to Welfare and Institutions Code section 6600 et seq.[1] He argues the trial court erroneously excluded portions of the testimony of his retained expert, Dr. Theodore S. Donaldson, thus leaving him with no defense to the petition. We conclude that the trial court's ruling was consistent with the Sexually Violent Predators Act (SVPA) and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

In 1986, Warren pled guilty to three counts of lewd acts with a child under the age of 14 by force, violence, or duress, and was sentenced to a term of 18 years. (Pen. Code, § 288, subd. (b).) The plea arose out of the rape of each of the three children (ages 2, 4, and 9 at the time) of the woman with whom Warren was living. The acts included sadistic components.

Prior to his scheduled release in 1996, a petition was filed seeking to commit Warren as an SVP. The petition was granted and Warren was committed for a two-year period. This process was repeated in 1998 and 2000, with the same results.

The latest petition was filed on September 26, 2002, seeking Warren's continued commitment. Prior to commencement of the scheduled jury trial, the People moved to exclude certain opinions of Dr. Donaldson. The motion was based on *People v. Burris* (2002) 102 Cal.App.4th 1096, in which the appellate court determined that Dr. Donaldson's theory of lack of volitional control was inconsistent with the SVPA.

After the trial court granted the motion, Warren withdrew his request for a jury trial and submitted the matter on the psychological reports on which the petition was based, reserving the right to challenge the admissibility of Dr. Donaldson's testimony on

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

appeal. The trial court made the requisite findings and committed Warren for a period of two additional years.

DISCUSSION

As stated in the introduction, Warren does not challenge the sufficiency of the evidence, or the applicability of the SVPA. Instead, the case hinges on the admissibility of Dr. Donaldson's proposed testimony.

In 1995 the Legislature enacted the SVPA, which is codified in sections 6600 et seq. (Stats. 1995, ch. 763, § 3.) Similar legislation has appeared throughout the country.

> "The SVPA … provides for the involuntary civil commitment of certain offenders, following the completion of their prison terms, who are found to be SVP's because they have previously been convicted of sexually violent crimes and currently suffer diagnosed mental disorders which make them dangerous in that they are likely to engage in sexually violent criminal behavior. (§ 6600 et seq.)
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> "One's initial or extended commitment under the SVPA depends upon his or her status as an SVP. An SVP is 'a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a)(1).) '"Diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.' (*Id*., subd. (c).)
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> "'The process for determining whether a convicted sex offender meets the foregoing requirements takes place in several stages, both administrative and judicial. Generally, the Department of Corrections screens inmates in its custody who are "serving a determinate prison sentence or whose parole has been revoked" at least six months before their scheduled date of release from prison. (§ 6601, subd. (a).) … If officials find the inmate is likely to be an SVP, he is referred to the Department … for a "full evaluation" as to whether he meets the criteria in section 6600. (§ 6601, subd. (b).)' (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1145 *(Hubbart)*, fn. omitted.)

"'The … Department … shall evaluate the person in accordance with a standardized assessment protocol … to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders[, including] criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.' (§ 6601, subd. (c).)

"'Pursuant to subdivision (c) [of section 6601], the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director …. If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director shall forward a request for a [commitment] petition … to the county designated in [section 6601,] subdivision (i)' (§ 6601, subd. (d)), i.e., the county where the offender was convicted of the crime for which he is currently imprisoned. [¶] … [¶]

"'[I]f the … Department … determines that the person is a sexually violent predator as defined in this article, the Director … shall forward a request for a [commitment] petition … to the county designated in [section 6601,] subdivision (i).' (§ 6601, subd. (h).) When a petition request is forwarded by the Director, and the county's legal counsel agrees with the request, a petition for commitment is filed in the superior court. (§ 6601, subd. (i).) [¶] … [¶]

"'At trial, the alleged predator is entitled to "the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and [to] have access to all relevant medical and psychological records and reports." (§ 6603, subd. (a).) Either party may demand and receive trial by jury. (*Id*., subds. (a) & (b); see *id*., subd. (c).)' (*Hubbart, supra*, 19 Cal.4th 1138, 1147.)

"'The trier of fact is charged with determining whether the requirements for classification as an SVP have been established "beyond a reasonable doubt." (§ 6604.) Any jury verdict on the issue must be "unanimous." (§ 6603, subd. (d).) … [W]here the requisite SVP findings are made, "the person shall be committed for two years to the custody of the … Department … for appropriate treatment and confinement in a secure facility …." ([§ 6604].)' (*Hubbart, supra*, 19 Cal.4th 1138, 1147.)" (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 902-904 *(Ghilotti)*.)

Enactment of the SVPA, and similar statutes, has engendered considerable litigation. Kansas's sexually violent predator act (the Kansas Act), which is similar to the SVPA (*People v. Williams* (2003) 31 Cal.4th 757, 764 *(Williams)*), was challenged on substantive due process grounds in *Kansas v. Hendricks* (1997) 521 U.S. 346 *(Hendricks)*. Hendricks was a pedophile who admittedly had trouble controlling his urge to molest children when he became "stressed out." (*Id*. at p. 355.) The Kansas Act defined a sexually violent predator as "'any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.' [Citation.] [¶] A 'mental abnormality' was defined, in turn, as a 'congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.' [Citation.]" (*Id.* at p. 352.)

The Kansas Supreme Court invalidated the Kansas Act, finding it violated Hendricks's right to due process because the statute's definition of "mental abnormality" did not satisfy the constitutional requirement that civil commitment statutes be limited to those individuals who have a "mental illness." (*Hendricks, supra,* 521 U.S. at p. 356.)

The United States Supreme Court acknowledged that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. [Citations.] We have consistently upheld such involuntary commitment statutes, provided the confinement takes place pursuant to proper procedures and evidentiary standards. [Citations.] [¶] … [¶] A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.' [Citations.] These added statutory requirements serve

to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." (*Hendricks, supra,* 521 U.S. at pp. 357-358.) The Supreme Court concluded that the Kansas Act satisfied the above requirements and did not violate Hendricks's right to equal protection. (*Id.* at p. 359.) The Supreme Court also held the Kansas Act did not implicate either ex post facto or double jeopardy principles. (*Id*. at pp. 369-371.)

The Supreme Court revisited the Kansas Act in *Kansas v. Crane* (2002) 534 U.S. 407 *(Crane)*. The Kansas Supreme Court vacated Crane's commitment as a sexually violent predator, finding that *Hendricks* required the State to prove that Crane could not control his dangerous behavior and the State had failed to meet this burden. The United States Supreme Court held that *Hendricks* did not impose such a requirement. (*Crane, supra,* at p. 411.)

> "We do not agree with the State, however, insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination. [Citation.] *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' [Citation.] That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence' -- functions properly those of criminal law, not civil commitment. [Citations.] The presence of what the 'psychiatric profession itself classifie[d] … as a serious mental disorder' helped to make that distinction in *Hendricks.* And a critical distinguishing feature of that 'serious … disorder' there consisted of a special and serious lack of ability to control behavior. [¶] In recognizing that fact, we did not give to the phrase 'lack of control' a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision. *It is enough to say that there must be proof of serious difficulty in controlling behavior.* And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist

convicted in an ordinary criminal case. [Citations.]" (*Crane, supra,* 534 U.S. at pp. 412-413, original and added italics.)

The California Supreme Court has addressed the SVPA on numerous occasions. In *Hubbart, supra,* 19 Cal.4th at page 1138, the Supreme Court cited *Hendricks* extensively in rejecting due process, equal protection and ex post facto challenges to the SVPA. In rejecting the defendant's claim that the SVPA deprived him of due process because it did not expressly incorporate a "mental illness" requirement, the Supreme Court stated, "Much like the Kansas law at issue in *Hendricks*, our statute defines an SVP as a person who has committed sexually violent crimes and who currently suffers from 'a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a).) Through this language, the SVPA plainly requires a finding of dangerousness. The statute then 'links that finding' to a currently diagnosed mental disorder characterized by the inability to control dangerous sexual behavior. [Citation.] This formula permissibly circumscribes the class of persons eligible for commitment under the Act." (*Hubbart, supra,* at p. 1158, fn. omitted.) In rejecting another argument, the Supreme Court reaffirmed that "due process *requires* an inability to control dangerous conduct …." (*Ibid.*)

The Supreme Court revisited the SVPA in *Ghilotti, supra,* 27 Cal.4th at page 888. The defendant was confined under the SVPA when the Director of the State Department of Mental Health (the Director) designated two psychologists formally to examine him. The psychologists both concluded the defendant no longer met the statutory conditions for confinement. The Director disagreed and a petition was filed to continue the commitment under the SVPA.

The Supreme Court rejected the Attorney General's suggestion that the SVPA permitted the filing of a petition, even in the absence of the recommendation of two psychologists. (*Ghilotti, supra,* 27 Cal.4th at p. 894.) The Supreme Court held, however,

that the Director retained the ability to challenge the formal evaluations if he or she concluded that the evaluations did not comply with the statutory framework. (*Id.* at pp. 912-913.)

To provide guidance in performing these evaluations, the Supreme Court discussed the statutory standard for determining whether a person diagnosed with a mental disorder is *likely* to engage in future acts of violence. (*Ghilotti, supra,* 27 Cal.4th at p. 915.) The Supreme Court concluded that the phrase "*likely* to engage in acts of sexual violence" (§ 6601, subd. (d)) "requires a determination that, as the result of a current mental disorder which predisposes the person to commit violent sex offenses, he or she presents a *substantial danger* -- that is, a *serious and well-founded risk* -- of reoffending in this way if free." (*Ghilotti, supra,* at p. 916.) "The SVPA thus consistently emphasizes the themes common to valid civil commitment statutes, i.e., a current *mental condition or disorder* that makes it difficult or impossible to control volitional behavior and *predisposes* the person to inflict harm on himself or others, thus producing *dangerousness* measured by a high risk or threat of further injurious acts if the person is not confined. [Citation.]" (*Id*. at p. 920.)

The SVPA was again addressed in *Williams, supra,* 31 Cal.4th at p. 757, which was decided after *Crane.* The issue presented was whether the SVPA adequately encompassed the constitutional requirement that before a person could be committed civilly there must be proof that the potential committee has "serious difficulty in controlling [his or her] behavior." (*Crane, supra,* 534 U.S. at p. 413.) The Supreme Court concluded the statute "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior. The SVPA's plain words thus suffice 'to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.' [Citation.]" (*Williams, supra,* at pp. 759-760.)

> "Thus, in essence, *Kansas v. Crane, supra,* 534 U.S. 407, (1) confirmed the principle of *Hendricks, supra,* 521 U.S. 346, that a constitutional civil commitment scheme must link future dangerousness to a mental abnormality that impairs behavioral control, while (2) making clear that the impairment need only be serious, not absolute.… [¶] … Though the high court rejected the State of Kansas's argument that *no* impairment-of-control 'determination' was required [citation], this language, read in context, appears intended only to verify that a constitutional civil confinement scheme cannot *dispense* with impaired behavioral control as a basis for commitment. [¶] As we made clear in *Hubbart, supra,* 19 Cal.4th 1138, California's SVPA, like the Kansas statute at issue in *Hendricks, supra,* 521 U.S. 346, and *Kansas v. Crane, supra,* 534 U.S. 407, does *not* dispense with that requirement. On the contrary, California's statute inherently *embraces and conveys* the need for a dangerous mental condition characterized by impairment of behavioral control. As we have seen, the SVPA accomplishes this purpose by defining a sexually violent predator to include the requirement of a diagnosed mental disorder (§ 6600, subd. (a)(1)) affecting the emotional or volitional capacity (*id.,* subd. (c)), which predisposes one to commit criminal sexual acts so as to render the person a menace to the health and safety of others (*ibid*), such that the person is 'likely [to] engage in sexually violent criminal behavior' (*id*., subd. (a)(1)). [Citation.]" (*Williams, supra,* 31 Cal.4th at pp. 773-774.)

It is unclear exactly what Dr. Donaldson's proposed testimony was to be. The issue was whether Warren lacked volitional control. Dr. Donaldson apparently would testify that while Warren has a mental defect or disorder, he also has free will and is capable of controlling his actions, i.e., he has volitional control. Dr. Donaldson appears to concede that it is likely Warren will reoffend. Dr. Donaldson apparently believes, however, that Warren can control his impulses but chooses not to do so because he has no inhibition or guilt about what he does to others.[2]

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[2] We apologize to Dr. Donaldson if we misstate his opinions. Unfortunately, we are working with a limited record in which Dr. Donaldson did not testify. We are trying to extract from representations by attorneys what Dr. Donaldson's testimony would be. It is possible that much was lost in the translation.

Assuming this was the proposed testimony, it is inconsistent with the SVPA. As the above cases establish, an essential part of the SVPA, indeed a constitutionally mandated part of the SVPA, is impaired behavioral control caused by a mental condition. Impaired behavioral control exists when the mental condition affects the SVP's emotional capacity or volitional capacity such that the SVP is likely to engage in sexually violent criminal behavior. (*Williams, supra,* 31 Cal.4th at pp. 773-774; § 6600, subds. (a)(1) & (c).) Warren's choice to engage in sexually violent criminal behavior because he has no inhibition or guilt would appear to be exactly the type of defect at which the SVPA is directed.

The psychological reports in the record state it is likely that Warren will reoffend. If we accept Dr. Donaldson's suggestion that this likelihood arises because Warren has neither guilt nor inhibition, and if this lack of guilt or inhibition exists because of Warren's diagnosed mental condition, Warren is an SVP.

This is the same conclusion reached in *People v. Burris, supra,* 102 Cal.App.4th at page 1096. We quote the summary of Dr. Donaldson's testimony from *Burris* because it appears similar to the testimony that was offered in this case.

> "He agreed that 'it is almost a certainty that [defendant] will continue to rape in the future.' One study showed that, over a 25-year period, the average rapist had a 25 to 39 percent chance of being charged with a new offense and a 24 percent chance of being convicted. Dr. Donaldson agreed that defendant's RRASOR score was a four, indicating a 48.7 percent chance of reoffending within 10 years. Defendant's actual likelihood of reoffending was probably higher.
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> "Dr. Donaldson disagreed, however, that defendant had a 'mental disorder' within the meaning of Welfare and Institutions Code section 6600. The definition of 'mental disorder' required an inability to control behavior.
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> "Dr. Donaldson defined volitional control as the ability to make a choice. A person is volitionally impaired when a 'driving force' overcomes his or her ability to make choices. 'Most people who are compelled to behavior … go through some sort of concern afterwards.… [T]hey look

pretty tormented about it.' Such a person would feel remorse. The fact that a person repeats criminal behavior after being punished does not show volitional impairment; it shows only 'risk-taking behavior.'

"According to Dr. Donaldson, defendant was not unable to control his behavior. Rather, defendant chose not to control himself. 'He acts out whenever he wants to.… He has a strong sense of entitlement. He is angry. A lot of his crimes involve … a lot of anger and aggression.' He was impulsive, but not compulsive. The fact that he had no qualms about his behavior meant that his volition was not impaired. An antisocial personality disorder was the antithesis of a volitional impairment." (*People v. Burris, supra,* 102 Cal.App.4th at p. 1103.)

The appellate court rejected Burris's contention that reoffending "impulsively or without considering the consequences is distinguishable from reoffending due to lack of control. 'Lack of control,' he argues, 'is more consistent with someone who knows and considers the consequences but is unable to stop ….'" (*People v. Burris, supra,* 102 Cal.App.4th at p. 1106.)

"We believe this is precisely the sort of 'narrow or technical meaning' which the United States Supreme Court has specifically refused to give to 'lack of control.' The court focused on lack of control because this factor serves to distinguish those recidivist violent sexual offenders who should be dealt with civilly from those who should be dealt with criminally. As the court observed, '[T]he two primary objectives of criminal punishment [are] retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct.' (*Kansas v. Hendricks, supra*, 521 U.S. at pp. 361-362.) 'Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior.' (*Id*. at p. 362.)

"It follows that a recidivist violent sexual offender who, due to a mental disorder, is unlikely to be deterred by the risk of criminal punishment lacks control in the requisite sense. The criminal law is ill-equipped to deal with such an offender. First, it cannot act until he commits a new offense -- which he must be expected to do, precisely because he is predisposed to offend and cannot be deterred. It cannot operate preventively; it is triggered only after he has imposed the costs of a new violent sexual offense on a new victim and on society. Second, it can

act only through incarceration. As long as the offender is incarcerated, he is unlikely to seek or to receive treatment. Then, when he is released, the cycle of waiting for him to commit a new offense must start all over again. The civil law, by contrast, can operate prospectively and preventively. Moreover, a civil committee has an incentive to seek treatment, and the committing authorities have an incentive -- indeed, an obligation -- to provide it. (See Welf. & Inst. Code, § 6606, subd. (a).)

"Certainly a person who does not want to rape, feels remorse after raping, yet continues to rape anyway, 'lacks control.' But a person who *does* want to rape, feels *no* remorse after raping, and continues to rape despite having been criminally punished for prior rapes, *also* 'lacks control.' This is so because neither offender is likely to be deterred by the risk of criminal punishment; thus, both should be dealt with civilly." (*People v. Burris, supra,* 102 Cal.App.4th at pp. 1106-1107.)

The trial court in this case excluded testimony from Dr. Donaldson that Warren was not an SVP, even though he was likely to reoffend because his actions were the result of a lack of inhibition or guilt, not because of a lack of control. The trial court's ruling is consistent with the SVPA and the proposed testimony was properly excluded. Warren's decision not to offer any other testimony from Dr. Donaldson precludes further analysis.

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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BUCKLEY, Acting P.J.

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DAWSON, J.